

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petitions	:	
	:	
of	:	
	:	
GLORIA TAFEEN,	:	
OFFICER OF AL JOSEPHSON	:	
WINES & LIQUORS, INC.	:	
	:	
For Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1990	:	
through May 31, 1993.	:	
	:	
	:	DETERMINATION
	:	DTA NOS.
	:	814204, 815637,
	:	815387 AND 815388
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For Revision of Determinations or for Refund	:	
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through November 30, 1993.	:	
	:	

Petitioner Gloria Tafeen, officer of Al Josephson Wines & Liquors, Inc., 1337 Broadway, Hewlett, New York 11667-2123, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1990 through May 31, 1993.

Petitioner Al Josephson Wines & Liquors, Inc., 246 Ashland Place, Brooklyn, New York 11217-1110, filed petitions for revision of determinations or for refund of sales and use taxes

under Articles 28 and 29 of the Tax Law for the period March 1, 1993 through November 30, 1993.

A hearing was commenced before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 2, 1999 at 10:30 A.M., and was continued to conclusion before the same Administrative Law Judge at the same location on May 18, 1999, with all briefs to be submitted by December 17, 1999, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). Petitioners appeared by Patrick M. Wall, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Robert J. Tompkins, Esq., of counsel at the hearings, and Cynthia E. McDonough, Esq., of counsel on the brief).

ISSUES

I. Whether certain notices of determination issued by the Division of Taxation assessing sales tax against Al Josephson Wines & Liquors, Inc. should be sustained.

II. Whether petitioner Gloria Tafeen should be held personally liable for payment of sales tax determined to be owed by the corporate petitioner Al Josephson Wines & Liquors, Inc.

FINDINGS OF FACT

1. During the period 1963 until the mid-1970s, petitioner Gloria Tafeen's late husband, Charles Tafeen, possessed a liquor license and operated a retail liquor store known as Al Josephson Wines and Liquors, Inc. ("Josephson") located at Humboldt Street, Brooklyn, New York. Mrs. Tafeen's involvement with Josephson during this period consisted of working at the store during the busy Christmas holiday season when she operated the cash register and also affixed pricing labels to the bottles of liquor and wine.

2. Charles Tafeen died on September 27, 1978. Shortly thereafter, Mrs. Tafeen received a telephone call from one Theodore Polon. Mrs. Tafeen was aware that her late husband had been involved in negotiations with Mr. Polon and with another liquor store owner regarding the Josephson store, but was unaware of the details of such negotiations. Mr. Polon offered a business proposition under which Mrs. Tafeen would be appointed “administratrix” of her husband’s liquor license (presumably administratrix of his estate including his liquor license), and that Mr. Polon would then pay Mrs. Tafeen \$25,000.00 per year to use her license to operate a liquor store.¹ Mrs. Tafeen was to sign all checks and other documents required for the operation of the business. She questioned Mr. Polon as to whether such an arrangement was legal and was assured by him that it was, that he had similar arrangements with a number of other stores, and that his attorney had worked out all of the details.

3. Mrs. Tafeen agreed to the arrangement proposed by Mr. Polon noting that “it sounded good. It was a source of income.” In 1979, Josephson commenced operation of a retail liquor store in premises located at 246 Ashland Place, Brooklyn, New York. These premises had been the location of a liquor store formerly operated by Mr. Polon until his liquor license was revoked.

4. Mrs. Tafeen initially believed she would be working some hours each week at the store. However, such did not turn out to be the case. She did not have a key to the store premises, did not physically perform any work at the store, was not included on the store’s health insurance plan, and had to pay for any purchases she made at the store. She did not hire or fire any of the store’s employees, did not order any of the store’s stock of inventory, and did not review any of

¹ Mrs. Tafeen stated in testimony at hearing that \$25,000.00 was her salary amount. Such amount also appears in a May 4, 1998 affidavit made by Mrs. Tafeen, but is then lined out and replaced with the handwritten figure \$35,000.00 along with the initials “GT” (presumably Gloria Tafeen).

the store's bank accounts or other records. She did not know who supplied the store with merchandise until after the period in issue when she was named in legal proceedings initiated by two liquor distributors seeking to recover on unpaid bills.

5. Mrs. Tafeen's role in Josephson's operations from 1979 until the early 1990s involved coming to the store premises once or twice monthly, when called by Mr. Polon or one of Josephson's employees or its accountants, in order to sign various documents. These documents included checks, as well as various other documents to be submitted to various agencies including the Department of Taxation and Finance and the State Liquor Authority. Mrs. Tafeen signed batches of checks in blank, but never filled in the amounts or payees thereof. The other documents she may have signed, including sales tax returns, corporate tax returns, and withholding tax returns were prepared by other persons including Josephson's accountants, and Mrs. Tafeen did not read such documents prior to signing them. At one point Mrs. Tafeen opened a bank account for the store at a bank office located near her home. However, it appears that deposits to Josephson's bank accounts were made at branch locations near Josephson's premises in downtown Brooklyn. Mrs. Tafeen did not make any bank deposits for Josephson and bank statements were sent to the store rather than to her home.

6. In the early 1990s, Mr. Polon advised Mrs. Tafeen that he needed the store manager, one Nick Rosenthal, to be able to sign checks on the Josephson account. In response, Mrs. Tafeen accompanied Mr. Rosenthal to a bank where she signed an application and a corporate resolution to open a bank account for Josephson, giving Mr. Rosenthal signatory authority thereon. Thereafter, Mrs. Tafeen did not sign any checks on the Josephson accounts. Periodically, from the inception of Mrs. Tafeen's arrangement with Mr. Polon until Josephson

closed, she signed liquor license renewal applications and represented herself to the State Liquor Authority as the owner and president of Josephson.

7. Mrs. Tafeen acknowledged that because the liquor license was in her name and she was the sole officer (president) and stockholder of Josephson, she would have to sign various documents. She never asked to review any of the documents she signed, and did not ask to see Josephson's bank statements or other records. She did not read the State Liquor Authority license application renewals she signed, and did not consider terminating her license for the store. In the same vein, she never considered refusing to allow Nick Rosenthal signatory authority on the Josephson account described above.

8. During the course of proceedings herein, Mrs. Tafeen reviewed the signature of her name as appearing on many of the documents described, including various tax returns and checks drawn on the three Josephson bank accounts. She acknowledged that some of the signatures were hers, but disavowed many others, and indicated that someone else apparently signed her name in many instances, specifically during the years in issue. She was not aware of this practice at the time of the store's operation. Mrs. Tafeen signed whatever documents at whatever times as requested until 1989 or 1990, but she stopped going to the store location in 1989 or 1990 and did not sign documents thereafter. Mrs. Tafeen never asked to see any of Josephson's records at any time, and never considered refusing to sign a document or refusing a request by Mr. Polon or other store employee to do something.

9. Mrs. Tafeen became aware near the beginning of her arrangement with Mr. Polon that he had previously been involved in difficulties with the State Liquor Authority, had lost his liquor license and could not have his name appear as the owner of the building in which Josephson operated. Mrs. Tafeen later learned that the building was owned by Ashland Corner

Corporation, an entity whose principal, one Arlene Richman, had been involved in a long-term personal relationship with Mr. Polon. Mrs. Tafteen was “uneasy” with Mr. Polon but gave no specific reason why, and noted that “he had a file that thick” with the State Liquor Authority and could not obtain a liquor license in his own name. However, she stated that she had “no reason to know until this tax thing that he had done anything criminal.”

10. As described, Mrs. Tafteen was to be paid a “salary” of \$25,000.00 per year for allowing Mr. Polon to use her liquor license. She was paid this salary during the initial years of her arrangement with Mr. Polon, but the payments from Mr. Polon gradually dropped off in the late 1980s to about \$200.00 per month in a “good month.”

11. By a letter dated December 8, 1993, the Division of Taxation (“Division”) advised Josephson that an audit was to be commenced on December 16, 1993. The initial audit period spanned March 1, 1990 through February 28, 1993, and was expanded thereafter to include the period March 1, 1993 through May 31, 1994. The Division requested records of Josephson’s operations, including sales invoices and purchase invoices. However, the Division was informed that no records were available. In turn, the Division canvassed various liquor suppliers by letter to obtain information on sales made to Josephson during the audit period.

12. The auditors summarized the purchases by Josephson as reported by the various suppliers. The auditors then applied a standard Dun and Bradstreet industry markup percentage of approximately 25 percent against such purchases to calculate total sales for the first two sales tax quarterly periods covered by the audit (3/1/90 through 8/31/90). For the remaining quarterly periods covered by the audit, the auditors computed a markup by reference to Josephson’s 1991 and 1992 Federal corporation income tax returns (specifically by dividing gross profits by cost of goods sold as reported on such returns), and applied the resulting markup percentage ranging

from 84 percent to 92 percent to purchases per suppliers to arrive at total sales. No nontaxable sales had been reported by Josephson, and the auditors accordingly considered all sales to be taxable. As a means of confirming the purchase amounts reported by Josephson's suppliers the auditors obtained, under subpoena, information from Josephson's banks as to deposits made during the period under audit. Among other things, the auditors concluded that sales as reported per Josephson's tax returns were based on deposits into one of Josephson's three accounts.

13. Sales tax was computed on total audited sales as calculated above. After reducing such sales tax amount by the amount of sales tax remitted with Josephson's sales tax returns, the Division assessed the balance of tax due, via notices of determination issued to Josephson and to Mrs. Tafeen as set forth hereinafter:

NOTICES ISSUED TO JOSEPHSON

<u>NOTICE NUMBER</u>	<u>DATE ISSUED</u>	<u>PERIOD</u>	<u>TAX AMOUNT</u>
L-012078397-1	05/28/96	03/01/93 - 05/31/93	\$58,519.00
L-012550528-9	08/19/96	06/01/93 - 08/31/93	\$38,360.00
L-012841960-5	11/04/96	09/01/93 - 11/30/93	\$33,782.00

NOTICES ISSUED TO GLORIA TAFEEN

<u>NOTICE NUMBER</u>	<u>DATE ISSUED</u>	<u>PERIOD</u>	<u>TAX AMOUNT</u>
L-007951479-8	09/23/93	03/01/90 - 08/31/90	\$19,462.24
L-012138262-6	06/07/96	03/01/93 - 05/31/93	\$58,519.00

The dollar amounts ("tax amount") set forth above are exclusive of penalty and interest, which were also assessed as due. Specifically, the Division assessed penalties for civil fraud (Tax Law § 1145[a][2]), negligence (Tax Law § 1145[a][1][i]), and omnibus penalties (Tax Law

§ 1145[a][1][vi]). However, the Division opted not to pursue the civil fraud penalties and advised petitioners that only the negligence and omnibus penalties were at issue.

14. With regard to Notice No. L-007951479, the Division's answer (Ex. C) describes at paragraph "9" the steps taken in calculating the tax assessed (\$19,462.24) for the period 3/1/90 - 8/31/90. Specifically, Josephson's total purchases for the year 1991 were divided by 13 quarterly periods to arrive at average quarterly purchases. The audit markup percentage was applied to the resulting average quarterly purchases to compute audited gross sales per quarter, with tax due computed thereon. However, paragraph "13" of the Division's answer states the "the Division hereby asserts a greater deficiency . . . for notice number L-007951479, because of mathematical errors in the computation described in paragraph 9 above." Specifically, the Division asserts that the total purchases for 1991 should have been divided by the 4 quarters in a year to arrive at average quarterly purchases rather than by 13 quarters as was done. Under this computation using a smaller denominator of four quarterly periods, average quarterly purchases and, in turn, audited gross sales are greater. Thus, a higher tax liability of \$56,039.11 results for the period 3/1/90 through 8/31/90, to wit, an increase of \$36,576.87 over the amount assessed per the notice of determination. The Division provided no further information or argument on this "assertion of a greater deficiency."

15. In or about February 1985, Mrs. Tafeen began working for Manhattan Feather and Down, an importing business owned by a close friend with whom she also had a personal relationship. This work included about three months of travel to Europe and to the West Coast, especially during the Christmas holiday season, and she was helpful in this business because she spoke some French and German. When her employer and friend began to experience difficulties as the result of Alzheimer's disease, she gradually came to take care of all of his personal

business, such as his telephone bill and banking and insurance matters. It does not appear that she actually became significantly involved in operating the business of Manhattan Feather and Down.

16. In May 1994, Mrs. Tafeen went back to Josephson's premises to retrieve her license after hearing that the business was closing. She found workers in the process of dismantling the store. It was at this point that she first became aware of the Division's claim that sales taxes were unpaid. Mr. Polon offered to pay Mrs. Tafeen \$200.00 per week from a new liquor store he was opening if she agreed to "keep her mouth shut" regarding what she knew about Josephson.

17. In 1997, Mrs. Tafeen and others including Mr. Polon, were named as defendants in two suits brought by two liquor distributors for recovery of unpaid bills. Mrs. Tafeen, by deposition in such lawsuits, averred essentially the same position as she puts forth herein, to wit, that she was not involved in and had no knowledge concerning the manner in which Josephson was being operated by Mr. Polon. In turn, the actions against Mrs. Tafeen were ultimately discontinued by stipulation of the parties.

CONCLUSIONS OF LAW

A. As an initial matter, no arguments have been raised by either petitioner concerning the audit method employed by the Division or the resulting dollar amounts of tax determined to be due as set forth on the various notices of determination listed in Finding of Fact "13".

Accordingly, such matters are accepted as not in contest and the notices of determination issued against Josephson are sustained, as are the calculated dollar amounts shown on the notices of determination issued against Mrs. Tafeen. However, while not contesting the dollar amounts or method of audit, petitioner Gloria Tafeen has asserted that she should not be held personally liable for the unpaid sales tax in question. On this score, Mrs. Tafeen asserts that she was duped

by Mr. Polon into believing that the arrangement under which Josephson operated was legal, that she was not involved in running the operation of Josephson other than that her name and license were used, and that the Division should pursue Mr. Polon. This issue of her ultimate liability for the dollar amounts of tax assessed on the notices issued against her remains to be resolved.²

B. With regard to sales and use taxes, Tax Law § 1133(a) states that:

“Every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article. . . .”

Tax Law former § 1131(1), in turn, defined “persons required to collect tax” and a “person required to collect any tax imposed by this article [Article 28]” to include any officer or employee of a corporation who, as such officer or employee, is “under a duty to act for such corporation in complying with any requirement of [Article 28].”

C. The mere holding of corporate office does not, per se, impose sales tax liability upon an officeholder (*see, Vogel v. New York State Dept. Of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862; *Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427, 430; *Matter of Unger*, Tax Appeals Tribunal, March 24, 1994, *confirmed* 214 AD2d 857, 625 NYS2d 343, *lv denied* 86 NY2d 705, 632 NYS2d 498). Rather, whether a person is an officer or employee liable for tax must be determined based upon the particular facts of each case (*see, Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Stacey v. State*, 82 Misc 2d 181, 368 NYS2d 448; *Chevlowe v. Koerner, supra*, 407 NYS2d at 429; *Matter of Hall*, Tax Appeals Tribunal,

² The Division’s “assertion of a greater deficiency” via its answer to a petition, as detailed in Finding of Fact “14”, is rejected. Article 28 makes no provision for the assertion of a greater deficiency based upon mathematical errors in audit calculations (*compare* Tax Law § 689[e][3], which specifically speaks to the assertion of a greater deficiency in income tax and provides that the burden of proof with respect to any such increase must be borne by the Division). While there is no apparent bar to the Division’s issuance of more than one notice of determination assessing additional tax for a given period (*see, Adirondack Steel Casting Co., Inc. v. New York State Tax Commn.*, 121 AD2d 834, 504 NYS2d 265), there is no evidence or claim that in this case the Division ever issued, within the appropriate period of limitations, such an additional notice of determination.

March 22, 1990, **confirmed** 176 AD2d 1006, 574 NYS2d 862; **Matter of Martin**, Tax Appeals Tribunal, July 20, 1989, **confirmed** 162 AD2d 890, 558 NYS2d 239; **Matter of Autex Corp.**, Tax Appeals Tribunal, November 23, 1988). Factors to be considered, as set forth in the Commissioner's regulations, include whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]). As summarized in **Matter of Constantino** (Tax Appeals Tribunal, September 27, 1990):

[t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation (**Cohen v. State Tax Commn.**, *supra*, 513 NYS2d 565; **Blodnick v. State Tax Commn.**, 124 AD2d 437, 507 NYS2d 536,538, *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027; **Vogel v. New York State Dept. Of Taxation & Fin.**, *supra*, 413 NYS2d at 865; **Chevlowe v. Koerner**, *supra*, 407 NYS2d at 429; **Matter of William D. Barton**, [Tax Appeals Tribunal, July 20, 1989]; **Matter of William F. Martin**, *supra*; **Matter of Autex**, *supra*).

D. The principal argument advanced by Mrs. Tafeen is that she was deceived by Mr. Polon into allowing him to use her liquor license, but that she had nothing to do with the daily operations of Josephson's business and exercised no authority over such operations. In order to prevail in this matter, petitioner was required to establish by clear and convincing evidence that notwithstanding her status as the sole shareholder and president of Josephson and holder of its liquor license, by virtue of which she had actual authority over Josephson's operation, she was nonetheless thwarted by others in carrying out her corporate duties *through no fault of her own* (**Matter of Goodfriend**, Tax Appeals Tribunal, January 15, 1998). Upon review of the entire

record, it becomes clear that petitioner Gloria Tafeen has not met this standard and was properly held liable for the sales tax obligations of Josephson.

E. As a starting point, Mrs. Tafeen received the benefit of Josephson's profits, in the form of payment of her "salary" for at least a number of years, for simply allowing Mr. Polon to use her license. In so doing, she participated in misleading the State Liquor Authority into believing that she was involved in the operation of Josephson's business. While claiming that she knew nothing about Josephson's daily operations the fact remains that Mrs. Tafeen, as owner, sole shareholder, and holder of the liquor license, was under an obligation to assure that tax was remitted, and she should have made inquiries as to tax compliance. Mrs. Tafeen, however, chose not to inquire and simply to abdicate her responsibilities. The record contains no evidence of any restrictions on Mrs. Tafeen's ability or authority to inspect the corporate books and records. Rather, she simply never asked to do so. In fact, there is no evidence that Mrs. Tafeen ever made any inquiry beyond her initial question to Mr. Polon, a person she came to realize had problems with the State Liquor Authority, concerning whether the Josephson arrangement was legal.

Mrs. Tafeen argues that because she was uninvolved and had no knowledge of Josephson's operations or, specifically, of its tax problems, she should simply be absolved of liability and points to others in the corporation who should be held responsible. Even accepting her arguments that others, including Mr. Polon, should be held responsible, the same would not excuse petitioner from responsibility, for liability with respect to sales taxes is joint and several (*see, Matter of Phillips*, Tax Appeals Tribunal, May 11, 1995; Tax Law § 1133[a]). While Mrs. Tafeen chose to be uninvolved in Josephson's daily operations, and not to inquire about its ongoing business operations, the fact remains that she had no lack of actual authority over the affairs of Josephson. There is no evidence that she was in any manner overtly restricted, limited

or precluded from overseeing Josephson's affairs and assuring that taxes were being remitted, other than as a direct result of the manner in which she chose to be uninvolved in the business. The record reveals no physical or legal impediment to inquiring or acting, nor of being deliberately misled, lied to or thwarted in the face of any inquiries or other efforts to assure compliance with Josephson's tax obligations. Simply put, the record does not support the conclusion that Mrs. Tafeen did not have or could not have exercised sufficient authority and control over corporate affairs to assure that sales tax was collected and remitted. (*Matter of Goodfriend, supra; see, Matter of Harshad Shah*, Tax Appeals Tribunal, February 25, 1999). In fact, she never inquired and instead it appears she simply allowed continued operations in the hope that she would receive payment of her "salary" based on allowing the use of her liquor license. Mrs. Tafeen's total delegation to Mr. Polon, in light of her continued filings with the State Liquor Authority and her knowledge of Mr. Polon's prior problems with the State Liquor Authority, was not a reasonable delegation of her responsibilities. Accordingly, petitioner was properly held responsible for Josephson's sales tax payment obligations, including the negligence and omnibus penalties imposed with regard to Josephson's nonpayment of sales taxes for the quarterly periods in issue.

F. The petitions of Al Josephson Wines & Liquors, Inc. and Gloria Tafeen, officer of Al Josephson Wines & Liquors, Inc. are hereby denied and the notices of determination set forth in Finding of Fact "13" are sustained.

DATED: Troy, New York
June 01, 2000

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE